UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC., D/B/A BFI NEWBY
ISLAND RECEYCLERY
Employer

and

FPR-II, LLC, D/B/A LEADPOINT
BUSINESS SERVICES
Employer

Case 32-RC-109684

and

SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS
Petitioner

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BRIEF OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA AS *AMICUS CURIAE*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

References:

INTRODUCTION

The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada ("IATSE" or "Union") respectfully submits this brief as *amicus curiae*, which addresses whether the National Labor Relations Board ("NLRB" or "the Board") should adhere to its existing joint employer standard or adopt a new standard, and if the Board adopts a new standard for determining joint employer status, what that standard should be. By this submission, the IATSE asks the Board to develop and apply a legal definition of a joint employer that examines all the ways that a putative employer may control terms and conditions of employment, accounts for the differing characteristics of employment conditions among varied workers in the contingent workforce, and fully respects the right to self-organization reflected in Section 7 of the National Labor Relations Act (the "Act").

STATEMENT OF INTEREST

The IATSE represents thousands of workers in the entertainment industry. Employees represented by the IATSE work in all forms of live theater, motion picture and television production, trade shows and exhibitions, television broadcasting, and concerts, as well as the equipment and construction shops that support all of these sectors. The IATSE represents virtually all of the behind-the-scenes workers in crafts ranging from motion picture animator to theater usher. The Union is comprised of 119,000 members and more than 380 local unions. At both the International and local union levels, the IATSE has sought, primarily through grass-roots organizing, to represent every worker employed in these crafts, yet the current joint employer standard has operated as a major and sometimes impossible hurdle to overcome, even when support for the Union is nearly unanimous. This obstacle is present in nearly every IATSE

organizing effort and collective bargaining arrangement because of the pervasive use by entertainment industry employers of intermittent, temporary, or subcontracted employees. Standard work arrangements where a person works full-time or part-time for one employer are increasingly rare. Instead, producers of film, television, sporting events and live theatre routinely contract with supplier employers, who in turn may subcontract with other supplier employers to furnish qualified personnel.

The IATSE maintains a separate Broadcast Department responsible for organizing and bargaining contracts for freelance technicians performing work in connection with the telecasting/broadcasting of sports events by cable sports broadcasting networks. These freelance technicians include technical directors, camera operators, videotape operators, digital disk device operators, video technicians, audio technicians, Infinit! Operators, graphic coordinators, box/score box operators, stage managers, and utility technicians performing pre-and post-production work. The cable sports broadcasting networks produce their telecasts from remote mobile trucks at venues where events take place. The cable networks contract with companies to supply the trucks. The trucks include equipment necessary for producing the telecasts (e.g. cameras, videotape machines, graphics machines, audio microphones, announcer headsets, etc).

Crewing companies (commonly known as a "crewers") supply the technicians who operate the equipment and perform the telecasting work for the cable sports networks. The cable sports networks pay the crewers for the work performed by the freelance technicians; the crewers then pay the technicians. In this common scenario, the cable sports broadcasting companies are the user employers and the crewing companies are the supplier employers.[1]

[1] "User" and "supplier" are used throughout this brief in the same manner as those terms were used by the Board in M.B. Sturgis, Inc., 221 NLRB 1298 (2000). The terms "crewer" and "supplier" may be used interchangeably.

Under the NLRB's present joint employer standard, unless the cable networks in these circumstances exercise "direct and immediate" control over employment matters unions, including the IATSE, face the likelihood that the cable network will not be an employer within the meaning of the Act. Yet, if the IATSE is successful in organizing a supplier employer, the user employer may still maintain a final say in collective bargaining, particularly regarding wages and benefits as well as control over hiring and firing workers.

If and when the IATSE is able to engage in collective bargaining with a crewing company, a user employer (e.g. cable broadcasting network, though disavowing that they are an employer under the Act, jointly or otherwise) is often in direct contact with the crewing company during any negotiations between the IATSE and the crewing company. Certain user employer representatives have even admitted to the IATSE that their labor relations professionals are in direct contact with the crewing companies and that the user employers are participating in making proposals and engaging in the give-and-take of bargaining—just not openly at the bargaining table. In a particularly remarkable example, a labor relations representative for a national cable network was in the same hotel several floors up from the room where the IATSE was negotiating with the crewing company. Though the cable network's representative never officially entered the bargaining room, he stayed in contact with the owner of the crewing company during the entire negotiation (obviously, because the cable network, and not the crewing company was ultimately responsible for any economic terms). Certainly, the intent behind the Board's joint employer standard could not have been to encourage and facilitate schemes such as described above.

Within its Broadcast Department, the IATSE has collective bargaining agreements in six territorial regions where a national sports cable broadcasting company is the end user of IATSE

workers' labor. In only one of these regions is that user employer the IATSE's collective bargaining partner. In the five other regions, the IATSE bargains only with a supplier employer. The ultimate user, a national sports cable broadcasting company, determines the employees it wants to employ and directs the supplier accordingly. The user cable broadcasting company determines the budget. It directs the work to be performed, and determines the scope of the work to be performed. Yet, as described more fully below, the cable broadcasting company is not apt to be deemed a joint employer under the Board's current standard.

In addition to the bargaining difficulties presented above, this summary seeks to describe how entertainment companies with non-traditional work arrangements control the material terms of employment of their subcontracted workforce. In many circumstances, user employers can and do tell the supplier/crewer which workers they want to work on their broadcasts or events. The user employers give preference to some individuals while denying employment to others. Moreover, if the suppliers disagree with a user's choice of employee, the supplier has no authority to make a change in staffing without losing the user as a client. Likewise, if the IATSE negotiates a condition with the supplier that a user does not like, the user merely changes suppliers, forcing the Union to organize the same pool of workers over and over.

Where the IATSE is a party to contracts with only supplier employers, the user employers may exercise rights under their agreements with the supplier employers to have specific employees terminated. But when the IATSE files grievances with the supplier employers, the supplier employers assert that they have no control over the termination. Thus, the IATSE is in bargaining relationships with supplier employers who do not have full power to execute their obligations under their collective bargaining agreements because of the suppliers'

contracts with the user employers. Ultimately, the user employers retain the right to hire and fire without having the duty to bargain with the IATSE.

A recent example involving a national cable television provider and a local crewing company illustrates this point. To effectively represent the interests of the crewer's employees, the IATSE would have favored a bargaining relationship with both the (supplier) local crewing company and (user) national television provider as joint employers. Concerned that it would not be successful under the Board's current joint employer standard, the IATSE organized only the local crewing company.[2] Meanwhile, the national cable provider maintained and exercised the right to refuse to hire or re-hire certain crew members. After the IATSE ultimately achieved a first collective bargaining agreement with the crewing company, it filed a grievance against the crewing company on behalf of a rejected crew member. In response, the crewing company asserted that it had no say over whom the user national cable provider hired or fired. Thus, the cable provider (the ultimate user employer) was able to exercise the ultimate control over an employee, while remaining obligation-free under the NLRA.

More generally, assisting the organizing efforts of live event staff has become impractical because of event producers' use of subcontracted labor. The threat that user employers will simply change to different non-union labor suppliers constantly frustrates IATSE organizing campaigns. Even in cases where the NLRB has ordered an election among the subcontracted employees, production managers (agents of the user employers) have told potential units of stage workers that regardless of the election results, the user employer will never agree to jointly represent the stage worker employees along with the supplier employer.

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[2] When a national cable broadcast company covers a local sporting event, it typically hires a local crewing company, which provides camera and rigging equipment, along with operators and crew.

One example from the live theatre craft provides context. The IATSE's Local 798 filed a petition seeking to represent, among others, theatrical hair and wig technicians at Radio City Music Hall.[3] Radio City, the user employer, obtained those employees for live theater performances from a subcontractor. Radio City asserted and the Regional Director found that Radio City was neither the employer nor the joint employer of the petitioned-for unit. Thus, even though Radio City had, by virtue of its contract with the supplier employer, ultimate control over wages, control over hours, and the right to exercise final say over the hiring and firing of the technicians. The representation petition was dismissed.

SUMMARY OF THE ARGUMENT

Having provided the foregoing background, we now turn to questions posed by the Board's Notice and Invitation to File Briefs: (1) Should the Board adhere to its existing joint employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard? And (2) if the Board adopts a new standard for determining joint employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

The Board should not adhere to its existing joint employer standard. It is overly restrictive and flawed. The current standard does not define joint employer in ways consistent with the realities faced by the contingent workforce and, in particular, faced by those working within the crafts represented by the IATSE. As discussed more fully below, under a revised standard, the Board would be able to conclude that an entity is a joint employer so long as it has the right to control some material conditions of employment. A revised standard should differ

[3] Radio City Prods., LLC, 02-RC-119275 (2014).

from the current standard in that it places added focus on the right of control and examines all (not only "essential") terms of the employment relationship. Finally, in conjunction with its revised standard, we also urge the Board to reaffirm its earlier finding that, in representation proceedings, a petitioning labor organization may name in its petition, one out of two joint employers, and need not name both.

ARGUMENT

I. Should the Board adhere to its existing joint employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?

The Board's current joint employer standard is set forth in TLI, Inc., 271 NLRB 798 (1984) (citing NLRB v. Browning-Ferris Indus., 691 F.2d 1117 (3d Cir. 1982)) and Laerco Transp., 269 NLRB 324, 325 (1984). Each joint employer is a separate independent entity, but they have "historically chosen to handle jointly . . . important aspects of their employer-employee relationship." Browning-Ferris, 691 F.2d at 1122 (citation omitted). "Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment." Id. at 1123.

For at least fifty years, the Board has recognized joint employer determinations as factual issues. The question is whether an entity possesses sufficient indicia of control over the work of given employees to qualify as their joint employer. Boire v. Greyhound Corp., 376 U.S. 473, 481, 84 S. Ct. 894, 899 (1964). In recent decades, the Board has persistently asked whether a putative joint employer "meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." Laerco, 269 NLRB at 324.

While the Laerco Board describes the joint employer concept as one in which separate companies share or codetermine those matters governing the "essential" terms and conditions of employment, this approach has been appropriately criticized. See Pitney Bowes, Inc., 312 NLRB 386, 387 n.1 (1993) (stating that Member Raudabaugh "does not agree that a 'joint employer' analysis should focus only on 'essential' terms and conditions of employment. That analysis gives no weight at all to other terms and conditions of employment. Member Raudabaugh would consider all terms and conditions of employment, albeit he would attach greater importance to the 'essential' ones.") (citation omitted and emphasis added).

More significantly, the Laerco Board, without good reason, restricted its inquiry to certain substantial terms and conditions. Citing no authority, the Laerco Board found that supervision by a putative joint employer in that case did not result in a joint employer relationship because the indicia of supervision was "minimal and routine" in nature. That phrase has since become an indispensible mantra in virtually every joint employer case. See e.g., Flagstaff Med. Ctr., 357 NLRB No. 65, slip op. at 9 (2011) ("The Board has held that the evidence of supervision that is limited and routine in nature does not support a joint employer finding.") (citation omitted).

The "limited and routine" mantra has in turn given way to a similarly unjustified and inexplicable requirement that a joint employer's control must be "direct and immediate." See e.g., Airborne Freight Co., 338 NLRB 597, 597 n.1 (2002) ("The essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate.")

The Regional Director's rendition of the joint employer standard in the instant case marks a familiar summary of these views. See Regional Director's Decision and Direction of Election,

32-RC-109684, at 12. ("Essential terms and conditions of employment are those involving such matters as hiring, firing, discipline, supervision, and direction of employees. However, the putative joint employers' control over these employment matters must be direct and immediate.") (internal citations omitted).

By narrowing its focus in this way, the Board has raised a significant barrier to the exercise of employees' rights under Section 7 of the Act. This is especially true for workers in the IATSE's industries. For example, cable sports broadcast technicians (described above at pages 2-3) are typically highly-skilled and lack any need for extensive and direct daily oversight. A camera operator would be putatively "hired" by a crewer to serve on the film crew for a designated sporting event. Upon arrival at the sports venue, a producer (i.e., the user-employer) may assign the camera operator to a specific filming location. But the producer would otherwise rely on the camera operator's expertise to determine the appropriate camera angles, shots, close-ups, and the like. The camera operator would complete the telecast without extensive input from the producer.

The producer naturally retains control over other significant aspects of the camera personnel's work (e.g., the overall theme or design of the production, the crew size, timing, location, and hours of the shoot). Yet, the Board's joint employer test would likely discount that evidence. In applying its current standard, the Board would be likely to find that because the producer provides no "direct and immediate" supervision, it is not a joint employer of the crew. Those instances where the producer actually directs the crew's workforce are wrongly dismissed as too "limited and routine" within the Board's definition. See, e.g., Flagstaff, 357 NLRB No. 65, slip op. at 9 (supervision is "limited and routine" where instructions consist primarily of

telling employees what work to perform, where to perform it, but not how to perform it) (emphasis added).

Broadcast personnel are thus adversely affected by the current joint employer test, merely because of their expertise. The First Circuit recognized this complication in Holyoke Visiting Nurses Ass'n v. NLRB, 11 F.3d 302, 307 (1st Cir. 1993) ("That the referred employees were professional nurses who may not have required much instruction as to how to perform their work does not negate the power of supervision and direction that [the user employer] exercised over them once they reported for work.")

In the IATSE's experience, under the Board's current standard, the abundant rights of control retained by user employers are outstripped by less significant factors. In one recent example (Radio City Prods., LLC, 02-RC-119275, detailed at page 4 above), the Board's current standard entirely precluded employees from exercising their right to self-organization under the Act. A subcontractor employed all the employees at issue. Under the written contract between the supplier and the theater, the theater (the user in that case) actually set the employees' hours of work, had the right to exercise final say over the hiring and firing of personnel, and had the authority to set a contractual pay rate for the entire crew. Yet, those factors were deemed too attenuated to establish that the theater was a joint employer. This result entirely contradicts the Board's historic view that employees should be "entitled to the protection of the Act even though the employer does not exercise control over the entire employment relationship." Volt Technical Corp., 232 NLRB 321, 322 (1977).

The Board's current standard as articulated in Laerco and TLI places far too many jointly employed workers in the margins and beyond the protection of the Act. It readily underestimates factors indicating retained (though unexercised) controls over employees, and

often ignores the commercial relationship between user and supplier employers. As discussed more fully below, a broad view of all features of the relationships between employers and employees will more adequately advance the purposes of the Act.

II. If the Board adopts a new standard for determining joint employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

An appropriate standard would consider the totality of all circumstances surrounding the relationship between the worker and separate joint employers. The Board should continue to focus on each putative joint employer's right to control as a determinative factor, thereby hewing closely to the Supreme Court's approval of the Board's examination of whether a firm has "sufficient control over the work of the employees to qualify as a joint employer." Boire, 376 U.S. at 481. Yet a new standard should revise the Board's current approach in three ways: (1) the *exercise* of control (as opposed to the *right* to control) cannot be considered the sin qua non of joint employer status; (2) indirect economic control (e.g., that a user employer effectively controls employee wages) should be a critical factor in the determination; and (3) any terms of employment should be considered and the Board's tendency to focus on "direct and immediate" control must be abandoned. As discussed more fully below, all these principles find support in past applications by the Board.

Even though the authority may not be exercised, the authority to control some employment conditions deserves emphasis under the Board's revised standard. Historically, the Board and courts have viewed retention (as opposed to exercise) of control as evidence of a joint employer relationship. See e.g., Browning-Ferris, 691 F.2d at 1123 (joint employer concept asks whether company "retained for itself sufficient control of the terms and conditions of

employment of the employees who are employed by the other employer.") (emphasis added). Retained control need not actually be utilized.

The preservation of control—particularly over hiring and firing (e.g., the right to reject applicants)—may or may not be set forth in a contractual agreement. See e.g., Manpower, Inc., 164 NLRB 287, 287 (1967) (user employer can refuse to accept employees referred to it by supplier but relationship between both firms was based on "an oral agreement which is terminable at will by either party"); Spartan Dep't Stores, 140 NLRB 608, 610 (1963) (department store owner's license agreement provided it with a "peremptory right of discharge" over separate licensee company's employees). The right-of-control factor is particularly significant in the IATSE's experience, which is detailed at pages 4-5 above. In the broadcast industry, for example, the ultimate user of supplied labor retains the right to approve and reject specific personnel. And if it in fact exercises that right, it can do so through the supplier employer without the individual employees or the IATSE being aware. Retention of control over employment tenure —either by express agreement or otherwise— should be considered as evidence of joint employer status.

The commercial relationship between two putative joint employers should also be viewed as indicative of control under the Board's revised standard. A user employer's ultimate control over the wages of supplied employees (by virtue of its deal with the supplier) should bear heavily on the Board's analysis. In most of the IATSE's crafts, a user employer's contractual agreement with a supplier employer sets forth a rigid upper limit on the pool of wages available to the supplied workers. Those workers cannot exercise their rights under the Act unless they are able to bargain with the firm that controls capital. The short example set forth on page 3 above demonstrates the absurdity of this problem. The user employer (cable network) virtually stands

virtually stands over the shoulder of the crewing company. In that example, a workable joint employer standard would allow the IATSE to avoid this sham and bargain directly with the cable network official.

Earlier Board decisions recognize this reality. See e.g., D & F Indus., Inc., 339 NLRB 618, 640 (2003) (user employer "established the rates of pay" for employees supplied by a staffing agency and, "provided the funds from which they were paid"); Windemuller Elec., Inc., 306 NLRB 664, 666 (1992) ("Although [supplier employer] nominally set the wage rates for the employees, those rates were limited and substantially determined by the agreement between the Company and [supplier employer]..."); Floyd Epperson, 202 NLRB 23, 23 (1973) (user employer "through increases to [supplier employer] has some indirect control over their wages"). This factor may not always be determinative, and the importance attached to this factor may differ on a case-to-case basis. However, going forward, the Board's joint employer standard should recognize that a user employer that sets de facto wage limits upon a supplier employer substantially controls conditions of employment.

Finally, exclusively focusing on so-called 'essential' terms and conditions of employment "gives no weight at all to other terms and conditions of employment." Pitney Bowes, 312 NLRB at 387 n.1. Therefore, the Board's revised standard must examine all factors that meaningfully affect terms of employment, not only hiring, firing, discipline, supervision, and direction.

In many cases, employers have argued that they do not fall within the Act's coverage because of their affiliations with exempt government agencies. See e.g., Res-Care, Inc., 280 NLRB 670, 673 (1986). Under those similar circumstances, the Board will assert jurisdiction over the employer so long as it controls some matters related to the employment relationship. In this area, where private employers are affiliated with exempt public agencies, the Board has

ruled, "jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employees' terms and conditions of employment. Nor should the Board be deciding as a jurisdictional question which terms and conditions of employment are or are not essential to the bargaining process." Management Training Corp, 317 NLRB 1355, 1357 (1995). Here, the Board "focus[es] on whether the private employer controls some matters relating to the employment relationship involving the petitioned-for employees, such as to make it an 'employer' under the Act." Recana Solutions, 349 NRLB No. 109, slip op. at 2.

In the IATSE's experience, the unique employment conditions of the entertainment industry may necessitate a broader view of factors that a putative employer may control. Indeed, this is true across all industries. An employment term that seems nominal in one workplace may seem seismic in another. Thus, control over only the Board's loosely defined "essential" terms and conditions of employment should not continue to make or break a joint employer finding.

As a final and related matter, we submit that in representation proceedings before the Board, a petitioner should be entitled to name in its petition only one of two or more joint employers, as the case may be. While we believe that approach is allowed by current Board law, some doubt remains in light of the decision in Oakwood Care Center, 343 NLRB 659 (2004). In Oakwood, the Board held that consent of both employers is necessary where the petitioner seeks a bargaining unit inclusive of both jointly-employed and singly-employed workers – i.e., a unit combining solely-employed and jointly-employed employees of a single user employer. Id. at 663. Yet, where 100% of the petitioned-for unit is jointly employed, the Board has held that a "petitioner may . . . seek to bargain with and name in its petition only the single user employer." Professional Facilities Mgmt., 332 NLRB 345, 346 (2000). This is so because, "the absence of one of the alleged joint employers at the bargaining table does not destroy the ability of the

named employer (here, the user) to engage in effective bargaining with respect to its employees to the extent it controls their terms and conditions of employment." Id.

We urge the Board to reaffirm that principle. The naming of one user employer would also adhere to the rationale of Management Training Corp. See id. at n.4; see also All-Work, Inc., 193 NLRB 918, 919 (1971) ("Nor do we believe that the fact that the Employer does not exercise control over the entire employment relationship is a sufficient reason for failing to grant the laborers their statutory right to engage in collective bargaining.") As long as a petitioner establishes that one joint employer meets the Act's monetary jurisdictional standards, and (by necessity) controls material terms and conditions of employment there can be effective collective bargaining with that joint employer.

CONCLUSION

For the reasons set forth above, the IATSE respectfully requests that the Board abandon its current joint employer standard and implement a test that more effectively furthers the purposes of the NLRA.

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New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Adrian D. Healy, hereby certify that on June 26, 2014, I caused to be served a copy of the foregoing Brief of the International Alliance of Theatrical Stage Employees as Amicus Curiae in Browning-Ferris Industries, Case 32-RC-109684, by electronic mail on the following:

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